

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KEVIN ARWIN HOUSTON	§	
(BOP Register No. 25012-077),	§	
	§	
Movant,	§	
	§	
V.	§	No. 3:16-cv-3276-N-BN
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE**

Movant Kevin Arwin Houston, a federal prisoner, proceeding *pro se*, has filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. *See* Dkt. No. 1. This civil action has been referred to the undersigned United States magistrate judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge David C. Godbey. The undersigned issues the following findings of fact, conclusions of law, and recommendation that, regardless whether Houston’s motion to vacate possesses merit, because it is successive, the Court should transfer the motion to the United States Court of Appeals for the Fifth Circuit for appropriate action.

Applicable Background

Houston challenges two 1994 criminal judgments entered against him by this Court, *see United States v. Houston*, No. 3:93-cr-277-N (01) (N.D. Tex.); *see also* Dkt. No. 1 at 1, on the basis that 18 U.S.C. § 924(c) “is unconstitutionally vague” and that he received constitutionally ineffective assistance of counsel, Dkt. No. 1 at 3-4, 11-16.

The Court denied Houston's first post-conviction challenge to these convictions and sentences under Section 2255 as time-barred. *See Houston v. United States*, No. 3:02-cv-1338-H (N.D. Tex. Sept. 27, 2002).

Legal Standards and Analysis

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") limits the circumstances under which an individual may file a second or successive motion for post-conviction relief. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). In order to file a second or successive Section 2255 motion, a movant must show that the motion is based on:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). That determination must be made by a three-judge panel of a United States court of appeals before a motion is filed in the district court. *Id.* §§ 2244(b)(3) & 2255(h); *see, e.g., United States v. Mathis*, 660 F. Supp. 2d 27, 30 (D.D.C. 2009) ("As is readily apparent from this statutory language, the determination of whether a new rule of constitutional law exists must be decided *by the court of appeals* – and not by the district court – before the second or successive § 2255 motion may be filed in the district court." (emphasis in original)).

The appellate-certification requirement for a successive Section 2255 motion

“acts as a jurisdictional bar to the district court’s asserting jurisdiction over any successive [motion to vacate] until [the Fifth Circuit] has granted the [movant] permission to file” such a motion. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citations omitted); *cf. Arnold v. United States*, 598 F. App’x 298, 299 (5th Cir. 2015) (per curiam) (Movant “has already filed the one § 2255 motion to which he is entitled, and he has not received authorization to file another. Consequently, the district court properly concluded that it lacked jurisdiction over the motion.” (citing 28 U.S.C. §§ 2244(b)(3)(A) & 2255(h); *Key*, 205 F.3d at 774)); *United States v. Caicedo-Obando*, 426 F. App’x 301, 302 (5th Cir. 2011) (per curiam) (“The appeal is frivolous because the notice-motion was a successive § 2255 motion that the district court did not have jurisdiction to consider without authorization from this court, which was neither sought nor given.” (again citing 28 U.S.C. §§ 2244(b)(3)(A) & 2255(h); *Key*, 205 F.3d at 774)).

This clear lack of jurisdiction routinely requires that judges of this Court either deny an unauthorized successive Section 2255 motion or transfer such a motion “for want of jurisdiction” under 28 U.S.C. § 1631. *United States v. Fulton*, 780 F.3d 683, 686 (5th Cir. 2015) (transfer of a successive habeas application filed without first obtaining “authorization from the court of appeal” “for want of jurisdiction” under Section 1631 (citing *In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014) (per curiam))); *see, e.g., Garcia v. United States*, Nos. 3:12-cv-2420-M-BK & 3:06-cr-303-M (01), 2012 WL 3636876, at *1 (N.D. Tex. July 27, 2012), *rec. adopted*, 2012 WL 3636873 (N.D. Tex. Aug. 22, 2012)

(“Section 2244(b)(3)(A) constitutes a bar to the district court’s jurisdiction to consider a successive habeas application unless the United States Court of Appeals has first granted the petitioner permission to file such an application.” (citing *Key*, 205 F.3d at 774)).

Because Houston again challenges the same criminal convictions and sentences after the expiration of the period to pursue a direct appeal, and because he “has already filed the one § 2255 motion to which he is entitled, and he has not received authorization to file another,” *Arnold*, 598 F. App’x at 299, the Court currently lacks jurisdiction over the substance of this Section 2255 motion. And, regardless of any merit Houston’s current claims may possess, as the Fifth Circuit, not this Court, is the proper initial gatekeeper for a successive Section 2255 motion, Houston’s motion to vacate should be transferred to the Fifth Circuit under Section 1631 for appropriate action. *See, e.g., Fulton*, 780 F.3d at 686.

Recommendation

Pursuant to 28 U.S.C. § 1631, the Court should transfer the unauthorized successive motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 to the United States Court of Appeals for the Fifth Circuit for appropriate action.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: November 28, 2016

A handwritten signature in black ink, appearing to read 'D. Horan', is written over a horizontal line.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE